In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA,
Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellee,

STATE OF CALIFORNIA,
Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal, State of California, First Appellate District

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments make unconstitutional the sections of the San Francisco Municipal Housing Code providing that authorized employees under certain conditions may enter

any premises to carry out the health and safety inspections authorized by the Municipal Code, and that failure to permit such entry is a misdemeanor.

STATEMENT OF THE CASE

Appellant is the lessee of a portion of the ground floor of a three-story apartment building located at 225 Jones Street. Under the permit of occupancy issued by the San Francisco Department of Public Health, the entire ground floor of the building is restricted to commercial use. The permit also authorizes sixteen apartment units—eight on each of the second and third floors (R 18).[1]

Section 86 of Part III of the San Francisco Municipal Code requires that the Division of Housing Inspection of the Department of Public Health make an inspection, at least once a year, of all San Francisco apartment houses for the purpose of issuing such permits of occupancy (R 36-37).

On November 6, 1963, Inspector Nall went to the premises at 225 Jones Street to make this required inspection. Upon arrival, he was informed by the manager that the lessee of the store on the ground floor was living in the rear of the store. Inspector

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[1]Appellant alleged in his Petition for Writ of Prohibition that he resided in one of the sixteen apartments in the building (R 1). During the Superior Court hearing on the writ, he made an offer of proof to show that the original plans for the building provided for both a store and an apartment on the first floor (R 48). The occupancy permit had, since 1924, restricted the ground floor to commercial use (R 49).

Nall questioned appellant about his occupancy of the rear of the store and was informed by appellant that he did in fact live on the premises. Inspector Nall requested permission to enter, but appellant refused (R 2, 19).

Inspector Nall returned to the premises on November 8, 1963, and again requested permission to enter and inspect. Appellant again refused. Subsequently, a citation was mailed to appellant to appear in the District Attorney's Office on November 22 to show cause why a warrant should not be issued for his arrest for violation of Section 507 of the Housing Code (R 19-20). Appellant did not appear at the scheduled hearing (R 20).

That afternoon, Inspector Nall, with Inspector Reid, again returned to Jones Street and requested permission to enter. Inspector Reid informed appellant that it was the legal responsibility of the Health Department to make an annual inspection of every apartment house in San Francisco, that the existing permit did not provide for an apartment on the ground floor, and that it was illegal for him to occupy the premises as a residence. Appellant again refused permission to enter (R. 20).

Appellant was subsequently arrested and charged with a violation of section 507 of the Municipal Housing Code for resisting the execution of section 503 of the Municipal Housing Code (R 2-3, 5-6).

A demurrer to the complaint was filed in Municipal Court on the grounds that section 503 was unconstitutional (R 7-8). Following that Court's ruling against

him, appellant applied for a writ of prohibition in the Superior Court on the same grounds (R 1-16). The Superior Court denied the writ, ruling that section 503 was constitutional (R 27). This ruling was affirmed on appeal to the District Court of Appeal (R 60-71), and a petition for hearing before the Supreme Court of California was denied on November 16, 1965 (R 72). This appeal followed.

Section 503 of the San Francisco Municipal Housing Code provides:

> "Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of this Code provides for a fine of not more than $500.00 or for imprisonment not exceeding six months, or both, for any person who resists or opposes the execution of section 503.[2]

There is no provision in the San Francisco Code permitting forced entry by the inspector in this situation, nor is there any provision under which a "search warrant" could be obtained.[3]

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[2]The full text of section 507 is set forth in the Record (R 83).

[3]Additionally there would be no grounds for issuance of such a warrant under state law. See Cal.Pen.Code § 1524 (App. 1). It should be noted that the California State Housing law, Cal. Health and Saf. Code §§ 17910-17995, contains a similar right of entry provision. See Cal. Helath & Saf. Code § 17970 (App. 1-2). The state law also provides that no entry can be made between 6:00 p.m. and 8:00 a.m. without the consent of the owner or occu-

SUMMARY OF ARGUMENT

At issue in this case is the right of a local community to enact ordinances requiring the occupant of a residence to submit to a routine, duly authorized health inspection, without a warrant, conducted with due regard to his convenience. In *Frank v. Maryland*, 359 U.S. 360 (1959), and *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), this Court held that such inspections were proper. We submit that these cases were properly decided.

Periodic health and safety inspections, without the necessity of showing probable cause related to an individual residence, are essential for the safety and security of all those living in cities. An individual living in an apartment has no protection from hazardous conditions in an adjoining apartment except through a system of preventive inspections. Vigorous housing and building code enforcement is also essential to prevent the spreading blight of our cities, widely recognized as one of our most urgent problems. Such code enforcement has been encouraged and carried out through the federal government's urban renewal programs, designed to aid local communities in conserving and rehabilitating the local housing supply. These programs would be effectively destroyed without the power to inspect.

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pants, nor any entry in the absence of the occupant without a court order. Cal. Health & Saf. Code § 17972 (App. 2). Section 17983 provides that the Superior Court may make any order for which application is made pursuant to these sections (App. 2). Thus, there is a limited "search warrant" provision. Since San Francisco has enacted its own Housing Code, however, the provisions of the state law are not applicable. See Cal. Health & Saf. Code § 19825 (App. 2-3).

It was this essential power to inspect which was approved in *Frank* and *Eaton*. The reasoning of *Frank* is consistent with the Fourth Amendment in considering the needs of society as well as the individual's general right to be protected from unreasonable searches. The Fourth Amendment does not prohibit reasonable searches and the decisions of this Court interpreting the Fourth Amendment require that all facts and circumstances be considered in deciding whether a search is reasonable. Consideration of the facts and circumstances of a health inspection fully justifies the holdings in *Frank* and *Eaton* that health inspections without warrants but with appropriate safeguards are constitutional. A health inspection is totally different from a search for criminal evidence both in quality and in result, and is reasonably subject to a different standard. The imposition of a search warrant requirement would provide no greater protection against inspection and might even give less protection to privacy. We submit that the system established for making health inspections reaches an appropriate balance between individual rights and public security.

No reason has been advanced to justify changing the rule of *Frank* except the principle of privacy. Cases explaining the impetus behind and interpreting the Fourth Amendment recognize that the individual's right to privacy is subject to the public welfare. Moreover, there is a widespread consensus among state Courts and legislatures that such inspections are proper. These determinations, while not binding on this court, should be persuasive authority.

The circumstances of the routine inspection at issue here present even stronger reasons for finding that the right asserted is reasonable. The San Francisco ordinance is carefully circumscribed, and does not authorize arbitrary inspections. The sole purpose of the ordinance is to protect the health and safety of the residents of the city. The imposition of a search warrant requirement would serve no useful purpose where such a routine inspection is involved because there is no judicial function to be performed. Such a requirement, however, could make it impossible to carry on the programs attempting to safeguard and upgrade the lives of those confined by economics to the blighted areas of the city and would create both confusion and an intolerable burden on the Courts without achieving any more protection of the right to privacy than now exists.

ARGUMENT

THE FOURTH AND FOURTEENTH AMENDMENTS DO NOT MAKE UNCONSTITUTIONAL THE IMPOSITION OF A PENALTY FOR REFUSAL TO PERMIT THE HEALTH AND SAFETY INSPECTIONS AUTHORIZED BY THE SAN FRANCISCO CODE.

In *Frank v. Maryland,* 359 U.S. 360 (1959), this Court upheld the constitutionality of an ordinance similar to the San Francisco ordinance but with the additional requirement that the inspector have cause to suspect that a nuisance exists. Shortly after the decision in *Frank,* this Court had before it a case involving an ordinance nearly identical to the San Fran-

cisco ordinance. The state Court decision holding the ordinance valid was affirmed by an equally divided Court. *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960).[4]

Appellant, however, contends that the imposition of a penalty for refusing to permit a health and safety inspection without a warrant violates the Fourth Amendment because there is neither an emergency nor a lawful arrest (AOB 10). He would thus attempt to impose a fixed formula on the concept of Fourth Amendment reasonableness, and overrule entirely the carefully considered opinion of this Court in *Frank v. Maryland, supra,* which found such an ordinance reasonable after giving full consideration not only to the interest of society in the preservation of health and safety but to the right of the individual to privacy.

Appellant further contends that even if *Frank* remains, this ordinance must fail because it does not require probable cause. He supports this argument by asserting that "Justice Whittaker in providing the fifth vote for the result [in *Frank*] stated clearly that the ground for his concurrence was that the evidence showed that there was probable cause to justify a search." (AOB 26).[5] Appellant not only misreads this

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[4]Mr. Justice Stewart, one of the *Frank* majority, took no part in the case.

[5]Justice Whittaker's concurrence was clearly based on his understanding that the core of the Fourth Amendment prohibiting unreasonable searches applies to the states, that the Court's opinion adhered fully to that principle, and that the inspection approved was not an unreasonable search. See *Frank v. Maryland, supra,* at 373-74 (concurring opinion).

concurrence but overlooks the fact that Justice Whittaker was one of four Justices voting against noting jurisdiction in *Eaton,* where the ordinance required no probable cause, because *Frank* was considered controlling. See *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 248 (1959).

Finally, appellant apparently argues that the inspections provided for in the San Francisco ordinance are unconstitutional *even if a warrant were provided for* because no individual probable cause is required. See AOB 21-22.

In support of these arguments, appellant cites the history of the amendment and the decisions of this Court which apply the test of reason to the problems of search in areas other than health inspections.

Consideration of the history of the Fourth Amendment and the intent of the framers with regard to forfeitures and the use of general warrants to suppress free expression, to forfeit goods, or to search for and seize criminal evidence are hardly relevant in determining the reasonableness of health inspections. Consideration must be given to the interests of both society and the individual in reaching such a determination and here the history of the Fourth Amendment and the decisions of this Court support the approach of reason used in *Frank.*

We submit that *Frank v. Maryland, supra,* was properly decided and that its principle should be reaffirmed in the instant case. Health inspections cannot be analogized to searches for criminal evidence and reason does not require that our cities be strangled

in a constitutional straitjacket denominated an absolute right to privacy.

A. Health And Safety Inspections Conducted As Part Of A Planned Program, Periodically For Designated Facilities, Or By Designated Area, Are Essential To Protect Those Living In Cities And To Prevent The Decay Of The City Itself.

The health and safety inspection at issue in this case was undertaken pursuant to the specific provision of a municipal ordinance which requires that an inspection of all apartment buildings be made annually without any further showing of cause related to any individual apartment. Appellant raises the question of whether such inspections can constitutionally be made without a showing of individually related cause despite the clear implication in both majority and minority opinions in *Frank* that such inspections are proper. The *Frank* majority states,

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area by area search, or as here, to treat a specific problem, is of indispensable importance to the maintenance of community health. . . ." 359 U.S. at 372.

In writing for the dissenters in *Frank*, Justice Douglas noted:

> "Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions inimical to the public health are being maintained. . . ." 359 U.S. at 383.

Experience has indeed shown the need for such periodic and area inspections.

Possible health and safety hazards in a city apartment or other dwelling are not the occupant's business alone as they might be in an isolated country home. A fire started through the improper use or installation of heaters or applicances could spread through an entire apartment building or city block, destroying both lives and property. An inspection of the entire premises under reasonable conditions is a minor infringement of the right of privacy but is a major safeguard of the right of all the tenants to be reasonably secure against conditions over which they have no control. Even if it can be argued that a person has the right to endanger his own life by living in dangerous or substandard conditions it cannot be said that he has the same right with regard to his neighbor. The individual's only protection against safety hazards in adjoining apartments or buildings is the assurance that an adequate program of preventive inspections is taking place. Hazards are particularly likely to occur in areas not specifically designed or approved for the use currently being made of them since unauthorized and uninspected heating, cooking, or sanitation installations may well have been made.

The compelling reason why health and safety inspections cannot depend on complaints or a showing of probable cause is seen clearly in the report of a test survey conducted by a grand jury in New York City in 1953. The grand jury was convened to investigate hazardous, unsanitary conditions in housing, and fifteen square blocks of housing in three representative areas of Brooklyn were surveyed. Prior to the survey,

567 housing division violations had been reported by complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classified as "hazardous." Grand Jury Presentment, "In the Matter of the Investigation of the Enforcement of any and all Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc." Kings County Court, New York, Part 1, pages 6-8 (January 28, 1953); cited in Brief of the Member Municipalities of the National Institute of Municipal Law Officers as Amici Curiae, p. 5, *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960). Thus, this survey disclosed twenty-two health and safety violations for every one violation for which there was a complaint. More persuasive evidence of the great need for a sound health and safety preventive program based upon periodic or area-by-area inspections could hardly be found.

There is widespread agreement that the plight of our cities is one of the most urgent problems facing contemporary society.

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost intolerable burden." *Berman v. Parker,* 348 U.S. 26, 32 (1954).

In 1960, in addressing the first Governor's Conference on Housing in California, the Governor stated:

> "[S]preading blight threatens to destroy large parts of our cities as desirable places in which to live and work and raise a family. The mounting

social costs in terms of crime, delinquency and disease are notorious."[6]

These problems have been the subject of extended comment by both planners and lawyers among whom there is general agreement that the establishment of housing and building codes and their vigorous enforcement is essential to any program attempting to alleviate the problems of the city.[7] In 1960, this consensus was expressed as follows:

> "[T]he police power embodying the enactment or improvement and the sound administration and effective enforcement of adequate local codes, is crucial to the successful long-term accomplishment of planned rehabilitation.
>
> * * *
>
> "Without question, the failure to enact, improve, soundly administer, and effectively enforce adequate local codes, more than any other single cause, accounts for the huge tasks of the present urban renewal effort. The broad concepts of urban renewal, their evolution and objectives, and the attending costs forcefully attest the serious con-

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[6]Proceedings of the Governor's Conference on Housing, State of California, Department of Industrial Relations at 16 (1960).

[7]See, *e.g. Urban Renewal: Part I*, 25 Law & Contemp. Prob. 631 (1960); *Urban Renewal: Part II*, 26 Law & Contemp. Prob. 1 (1961); Gribetz & Grad, *Housing Code Enforcement, Sanctions and Remedies*, 66 Colum.L.Rev. 1254 (1966); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 Cal.L.Rev. 304 (1965); Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 Harv.L.Rev. 504 (1959); Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L.Rev. 801 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U.Chi.L.Rev. 180 (1963).

sequences of the neglect and default in this most important area of public action.

* * *

"[*T*]*o do the entire job, new ways and means must be developed to assure a practical and sustained process of planned rehabilitation on a community-wide basis*—at the heart of which must be adequate local codes soundly administered, and effectively enforced." Osgood and Zwerner, *Rehabilitation and Conservation,* 25 Law & Contemp. Prob. 705, 718-20 (1960).

Programs of code enforcement have not been a panacea, and even with them the problems of the cities remain acute. Without them, however, and with resort only to a program of responding to complaints, corrective measures could be taken only when the battle was lost and as a stop-gap before an area must be leveled, rebuilt, and the process permitted to begin again.

"[I]t is in the nature of the fight against deterioration and decay that enforcement must be continuous and sustained lest the ground gained earlier be lost." Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 Colum. L.Rev. 1254, 1257 n. 7 (1966).

In outlining the scope of the problem in New York, it has been pointed out that

"some 338,900 existing living units in the City of New York housing almost 1,000,000 people are contained in 43,000 old law tenements built prior to the effective date of the Tenement House Act of 1901." *Id.* at 1258 n. 13.

* * *

> "The city's aging housing inventory presents a broad spectrum of conditions from good upkeep to unbelievable deterioration. Buildings, even relatively good buildings, are likely to have numerous minor violations rather than the gross and evident sanitary violations of an earlier age. . . .
>
> "[The] task is to deal with masses of minor violations that, though insignificant in themselves, amount in the aggregate to major deprivations of health and comfort to the residents." *Id.* at 1268.

California fortunately lacks, in contrast with large eastern cities, the high density central slum districts provided by speculative builders to house European immigrants in the late nineteenth century. Although the problems in California are different, they are no less severe. Even by the relatively crude index used to compile census data, there are 700,000 substandard dwellings in the state. To a disproportionate extent, they are occupied by people who have special disadvantages along with relative poverty. See Appendix to the Report on Housing in California, Governor's Advisory Commission on Housing Problems 39 (1963). California also faces the enormous problem of not only preventing the further deterioration of the present housing supply, but of providing housing for an estimated population growth of over five million in the decade 1960 to 1970. *Id.* at 260-61.

The federal government's response to these persistent, complex and perhaps ultimately unsolvable problems, has been increasing steadily since its first large-scale involvement with the enactment of the

Housing Acts of 1937 and 1949.[8] These acts, however, authorized federal financial aid only for projects, involving complete demolition and clearance of slum areas and were ineffectual in preventing blight. They were also criticized for being of little value in meeting the need for low and low-middle housing, and for destroying established neighborhood values. See generally, Cunningham, *Land-Use Control—The State and Local Problems,* 50 Iowa L. Rev. 367, 454-57 (1965).

The first approach to a comprehensive urban renewal program came in 1954 with the amendment of the Housing Act[9] to provide federal assistance not only for slum clearance but for programs consisting wholly or in part of the rehabilitation and conservation of existing areas through building and housing code enforcement. This program has been expanded and revised since 1954[10] but the basic concept of a comprehensive program remains.

As the heart of the program, the act requires, as a prerequisite for federal funds, the establishment of a "workable program . . . to eliminate and prevent the development or spread of, slums and urban blight." 42 U.S.C. § 1451(c) (Supp. I, 1965). One of the elements of a "workable program" is the enactment of building and housing codes which state the minimum structural, safety, maintenance and

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[8] 50 Stat. 888 (1937); 63 Stat. 413 (1949).

[9] 68 Stat. 590 (1954).

[10] The act is codified in 42 U.S.C. §§ 1441-86 (1964). The last amendment of the act was made in 1966 in the Demonstration Cities and Metropolitan Development Act of 1966. Public Law 89-754, 80 Stat. 1255 (1966).

health standards both for existing and new housing. See Guandalo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1, 10-11 (1956).[11] The 1964 Housing Act amendments direct that, beginning in 1967, a workable program cannot be certified unless the locality has had in effect a housing code for at least six months and is carrying out an effective program of enforcement.

It was under the incentive of this federal program that San Francisco in 1958 enacted the comprehensive housing code of which the sections at issue in this case are a part. For similar reasons, not only San Francisco but cities throughout the nation have enacted or revised housing and building codes to obtain federal aid in attacking these pressing problems.[12]

These are the kinds of programs which would be destroyed if the power to make routine inspections is

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[11]Appellant makes no claim that the city cannot, under the police power, require conformance to minimum housing and building codes enacted in the public interest. Such laws have been repeatedly upheld. See, *e.g.*, *Queenside Hills Co. v. Saxl*, 328 U.S. 80 (1946); *cf. Berman v. Parker*, 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Appellant attacks, rather, the only means of enforcing such laws, inspection of the premises involved. It is an interesting historical note that the property rights subordinated to the public interest in the above cases were once considered "absolute" and inviolate: "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; not even for the general good of the whole community." Blackstone's Commentaries 26 (Elwell ed. 1889), cited in Guandalo, *supra*, at 14-15.

[12]Prior to 1954 there had been 56 housing codes enacted throughout the country. As a result of the workable program requirement, more than 1,000 communities have enacted housing codes since 1954. *Gribetz & Grad*, *supra*, at 1260 n. 19.

deemed to violate due process or the Fourth Amendment. These programs, developed to meet desperate and persistent problems, are hardly "arbitrary" invasions of privacy. The invocation of the Fourth Amendment would preserve "absolute privacy" for one individual but would remove the protection and security of this vital exercise of the police power from every other individual.

The Fourth and Fourteenth Amendments to the Constitution prohibit not all searches but only those which are unreasonable. *Carroll v. United States,* 267 U.S. 132 (1925). The Constitution does not define what are unreasonable searches and no "ready litmus paper" test nor fixed formula can be applied in this determination. *United States v. Rabinowitz,* 339 U.S. 56, 63 (1950). Reasonableness must be determined in each case in the light of its own facts and circumstances. *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931).

The facts and circumstances in cases involving health inspections are totally different from those of searches and seizures of evidence to be used in criminal trials. The overriding public interest in making the health inspections at issue in *Frank v. Maryland* and the instant case, when balanced against the minimal interference with the individual's right to privacy, fully justifies the holding of *Frank* that such inspections without a warrant are reasonable under the Fourth and Fourteenth Amendments. These considerations present an even stronger case for reasonableness in the circumstances of the instant case.

B. Frank v. Maryland, In Applying A Test Of Reason To The Facts And Circumstances Involved In A Health Inspection, Reached A Result Entirely Consistent With The Fourth Amendment And Should Be Reaffirmed.

Appellant attacks the decision of this Court in *Frank v. Maryland, supra,* by asserting that the majority opinion in *Frank* held that the protection of the Fourth Amendment was limited to searches for the purpose of obtaining criminal evidence. In fact, *Frank* held that although the Fourth Amendment was not restricted to searches for evidence in criminal cases, a health inspection without a warrant but with adequate safeguards was not an unreasonable search.[13]

1. The Frank court recognized the general applicability of the Fourth Amendment in holding that a health inspection was constitutional.

The majority opinion reviews the historic background of the Fourth Amendment and states that,

> "[T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection is self-protection; the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used

[13]Mr. Justice Frankfurter's opinion does not make it clear whether the balancing test employed was one of due process or one of Fourth Amendment reasonableness. *Compare Harris v. United States,* 331 U.S. 145, 162 (1947) (dissenting opinion). The concurring opinion of Mr. Justice Whittaker, however, makes it clear that the result was reached under the Fourth Amendment.

to effect a further deprivation of life or liberty or property." 359 U.S. at 365.

The Court notes that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions that the great battle for fundamental liberty was fought. The opinion continues,

> "While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are *of course not restricted within these historic bounds.*" *Id.* at 365-66. (Emphasis added.)

Thus, whether or not the Court "misread" the "historic bounds" of the Fourth Amendment, the opinion recognizes a general right to be secure from unreasonable official intrusion into personal privacy. The Court holds only that this right of privacy is subject to the public welfare in the circumstances before it.

The majority opinion considers the liberty which was asserted:

> "The absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place." 359 U.S. at 366.

It also considers the safeguards of the ordinance and concludes that the inspection touched "at most upon the periphery of the important interests safeguarded

by the Fourteenth Amendment's protection against official intrusion . . ." 359 U.S. at 367.

The Court then states the crucial factor to be considered: that the demand made on the individual by the inspector "must be assessed in the light of the needs which have produced it." *Ibid.* Balancing these needs, and the long history of the use of such inspections, the Court concludes that the Maryland statute is constitutional. The question in both *Frank* and the instant case is not whether the individual is protected from unreasonable and arbitrary searches whether for criminal evidence or otherwise. Certainly he is. The question is whether an asserted right to make a health inspection without a warrant is reasonable, and it was this question that *Frank* decided in the affirmative.

2. Application of the Rabinowitz holding that all circumstances are relevant in determining reasonableness supports both the process and the result in Frank.

The view of the Fourth Amendment articulated by this Court in *United States v. Rabinowitz, supra,* requires that all the facts and circumstances of an individual case be considered in determining whether or not a search is reasonable. The balancing process used by the *Frank* Court was in effect an application of this concept in a situation where the rules dealing with criminal searches were not really relevant in resolving the complex problems involved. This approach, that there is no fixed formula to determine reasonableness, found expression in *Frank* as the Court considered both the community needs prompting the inspection

and the seriousness of the invasion of privacy involved.[14]

There can be little question of the compelling community need which led to the adoption of housing and building codes and methods to enforce them. An examination of the extent to which the privacy of the individual is invaded, however, shows that a search warrant would serve, not to give any more protection from inspection, but, perhaps, to give less practical protection to privacy.

The health inspection is not directed against the individual nor necessarily even related to something he may have done or failed to do. No loss of liberty results, whatever condition is found. The sole purpose of the inspection is to find and correct a condition which creates a danger not only for the occupant but for others equally entitled to security in their homes. In the usual case, if the condition is not corrected, and depending on its seriousness or extent, the building is condemned, abatement proceedings initiated, or the condition repaired by public authorities.[15] Criminal prosecution for violation of the code results only when

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[14]For an interesting and provocative discussion of the relationship between *Rabinowitz* and *Frank*, see Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U.Chi.L.Rev. 664, 704 (1961).

[15]See generally, Note, *Enforcement of Municipal Housing Codes*, 78 Harv.L.Rev. 801 (1965). For a discussion of the problems involved in Housing Code enforcement see Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum. L.Rev. 1254 (1966); Comment, *Rent Withholding*, 53 Cal.L.Rev. 304, 314-23 (1965).

the responsible person refuses to act.[16] It should be noted that the person against whom this criminal action is brought may or may not be the occupant whose Fourth Amendment rights are involved.

The extent and quality of a health inspection are entirely different from a search for criminal evidence. Here there is no rummaging through private papers or effects for things which are hidden nor any seizure of personal effects. There is no sudden invasion of privacy through a forced entry as is often, if not usually, the case in criminal searches where contraband may be moved or destroyed. The usual inspection ordinance, similar to the San Francisco ordinance, does not grant any power to force entry where no emergency exists and requires that the inspection be made at a reasonable time. "Reasonable time" can only be interpreted as respect for the convenience and privacy of the occupant so far as practicable. See *Commonwealth v. Hadley* (Mass. 1966). The usual practice if entry is refused is for the inspector to return at another time more convenient to the occupant.[17] If no consent is given after several attempts,

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[16]See Note, 78 Harv.L.Rev. 801, 814 (1965). Criminal prosecution is generally considered an inadequate method of enforcement, partly because of the reluctance of the courts to impose any significant penalty. See Gribetz & Grad, *supra*, n. 15 at 1276-77, 1280. Demand is increasing for a remedy that will lead to improvement of the building, which in hard core cases, prosecution with a nominal fine fails to do. *Id.* at 1280-81.

[17]See Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 Colum.L.Rev. 288, 292 (1965). We are informed that this is also the practice in San Francisco, and the facts in this case show that it was followed.

an action must be initiated to impose a penalty. This gives the homeowner, as a practical matter, substantial protection.

When the method, *i.e.*, warrant or non-warrant, of conducting health inspections, not their legitimacy, is the question, the ability of the homeowner to control the time is the most important factor. It has been pointed out that an inspector with a warrant "would be more likely than under existing practice to insist on entry and homeowners would be more likely to submit —even though the intrusion might result in the inspector's witnessing conditions and events wholly unconnected with building violations, but nevertheless embarrassing to the occupant." Comment, *Administrative Inspections and the Fourth Amendment—A Rationale,* 65 Colum.L.Rev. 288, 292 (1965). Since the warrant would presumably give the right to force entry if the occupant resisted, the occupant would, in effect, lose an important protection. Thus, the "sanctity of a man's home and the privacies of life" protected by *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965), see AOB 28-30, would be more vulnerable to invasion.[18]

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[18]Appellant argues that whether or not the Fourth Amendment prohibits warrantless health inspections, the right to privacy has been violated in the instant case. See AOB 28-30. We have not answered this argument directly because we make no contention that the Fourth Amendment, through the Fourteenth, is inapplicable to health inspections. It seems too obvious to require comment that an inspection at the convenience of the occupant, if reasonable under the Fourth Amendment, does not violate the "right to privacy" considered in *Griswold.* We consider *Olmstead v. United States,* 277 U.S. 438 (1928), equally irrelevant to the instant case, whatever its intrinsic merit.

Finally; the occupant is neither punished nor subjected to a forced search without prior judicial approval. This is considerably more protection of the right to privacy than is given to a person who is arrested and searched before a judicial determination of probable cause. The only "risk" the homeowner takes is being wrong in refusing. Since he may delay the inspection, he has time to find out from the city department whether a routine or area inspection is underway or a complaint has been received. There is no complex set of interrelated facts from which "probable cause" must be determined as in a criminal case. There is a complaint, an observation by an inspector, or a routine requirement for an inspection. The existence of an unsafe condition can be immediately determined, unlike guilt in a criminal case, and can only be determined by inspection.

We, of course, do not contend that a health inspector may assert a right of entry without a reason. As a practical matter, it is highly unlikely that an inspector attempting to conduct an arbitrary or capricious inspection would pursue the matter through a criminal prosecution which could not succeed. This would actually be more protection than an occupant would have if the inspector obtained a warrant in the usual ex parte proceeding. Because of the nature of the "probable cause" which must necessarily be involved, see *Frank v. Maryland, supra* at 383 (dissenting opinion), the judge is unlikely to look behind the inspector's assertion.

> "To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect seems only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties." *Trupiano v. United States,* 334 U.S. 699, 714-15 (1948) (dissenting opinion).

It is submitted that the kind of system in issue is eminently reasonable, and in view of the urgency of the need and the complexity and variety of the problems involved, reaches an appropriate balance between individual rights and public security.

3. There is no basis for changing the rule of Frank.

With one exception,[19] the cases cited by appellant as demonstrating the incompatibility of *Frank* to the Fourth Amendment have little relevance to the problem of health inspections, except as they demonstrate the continuing concern of the courts in the protection of both society and the individual. Appellant, for instance, places great emphasis on *Entick v. Carrington,* 19 How.St.Tr. 1029 (1765). While the general

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[19] *District of Columbia v. Little,* 178 F.2d 13 (D.C. Cir. 1949), affirmed on other grounds, 339 U.S. 1 (1950). In *People v. Laverne,* 14 N.Y.2d 304, 200 N.E.2d 441 (1964), cited by appellant (AOB 18), the court held that a penalty for the violation of a zoning ordinance could not be imposed on the basis of evidence obtained in a warrantless search for this purpose, even if the asserted right of entry were proper. The case may be distinguished from the usual enforcement procedure because the penalty was imposed for the existing violation not for a refusal to correct it. However, when the inspection is proper, sanctions ultimately imposed to induce compliance should also be proper.

language of the decision establishes the principle of the sanctity of the home, which we of course affirm, it is hardly relevant to the complex problem at issue here. *Entick* is one of the milestones in English Constitutional history, marking the close of the Crown's contention that its prerogative is part of the common law, and that this prerogative permits action denied to others. Waters, *Rights of Entry in Administrative Officers,* 27 U. of Chi.L.Rev. 79, 80 (1959).

> "*Entick v. Carrington* merely decided that, as the common law withheld from all the right to search for and seize evidence to support a civil action, so it withheld from Crown and commoner a similar right in relation to a criminal prosecution—in particular, the utterance of a libel. Indeed, even in approaching this conclusion Lord Camden felt bound to qualify: 'The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.'" *Id.* at 81. See 19 How.St.Tr. at 1066.

Lord Camden admitted that there were legitimate invasions to this right of property: "That right is presumed sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole." *Ibid.*[20] We submit that a health inspection is such a case.

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[20]The comment points out that Lord Camden could not have foreseen the extent to which legislation was to become the medium of reform.

> "In a sense, however, the State has taken the place of the Crown, and the old constitutional cases still have importance

Appellant's reliance on *Boyd v. United States,* 116 U.S. 616 (1886), is similarly misplaced. The invasion of privacy deemed unconstitutional in *Boyd* was the forced production, in an action to impose both criminal penalties and forfeiture of goods, of private *incriminating* papers. The case is, in fact, a compelled self-incrimination case: the Court held that such papers cannot be seized with or without a search warrant describing them with particularity.

In both *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *Stanford v. Texas,* 379 U.S. 476 (1965), First Amendment freedoms were at issue and warrants had in fact been issued. *Marcus* was decided on First Amendment grounds. *Stanford* held that the articles *seized* were not described with the necessary particularity, a requirement of the "most scrupulous exactitude" where First Amendment freedoms are involved.[21] Apparently neither "search" would in itself have been improper.

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in their reiteration of the primacy of the individual in the common law. But how much further do they go? Power is no longer seated in an hereditary Crown, armed to the teeth with prerogative, but in an omnipresent machinery of government claiming a raison d'etre in the will of the majority. 'The fundamental problem' of this age might also be described as the increasing remoteness of the governed from the processes of democratic government, and the attendant consignment of the individual to an even more remote periphery. Interestingly enough, an English lawyer would barely see the relevance of *Entick v. Carrington* to the solution of this sophisticated problem." 27 U.Chi.L.Rev. at 82.

[21]Some of the books taken were "works by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and MR. JUSTICE HUGO L. BLACK." 379 U.S. at 479-80.

This Court, in *Stanford*, noted that the history of the struggle against oppression resulting in the Fourth Amendment had been fully chronicled in the pages of this Court's reports and did not review it again. The Court continued:

> "What is significant to note is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth and eighteenth centuries.
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> "It was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won—in the landmark cases of *Wilkes v. Wood* [19 How.St.Tr. 1153 (1763)] and *Entick v. Carrington* [19 How. St.Tr. 1029 (1765)]." *Id.* at 482-83.

Certainly the impetus behind the Bill of Rights involved more than protection from searches for criminal evidence and included both the privilege against self-incrimination and freedom of expression. To rely on the above cases to establish that health inspections without a warrant are improper, however, is to become involved in essentially irrelevant considerations. The Fourth Amendment does, of course, protect these rights: the First and Fifth Amendments compel this result. But these basic liberties are not menaced by a health inspector, without authority to seize anything, conducting, at the occupant's convenience, an inspection solely for health and safety hazards.

Moreover, these and the other Fourth Amendment cases cited, indicate that while, of course, both clauses of the Fourth Amendment protect against unreasonable intrusions on individual privacy, the warrant clause is particularly designed to protect against general or indiscriminate seizures.[22] Much confusion could perhaps be avoided if these warrants were called "seizure warrants" rather than "search warrants" as a more accurate reflection of their function. Thus, a "search warrant" is totally inappropriate to a health inspection where there is never anything to be seized, nor anything to describe with particularity.

The only case relied on by appellant which considers a health inspection is *District of Columbia v. Little,* 178 F.2d 13 (D.C. Cir. 1949), affirmed on other grounds, 339 U.S. 1 (1950), a two to one decision in the Court of Appeals which reversed a conviction for refusing entry to a health officer.[23]

Appellant quotes Judge Prettyman writing for the majority (AOB 18):

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[22] "The searches meant by the Constitution were such as led to seizure when the search was successful. . . . Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing." *Boyd v. United States, supra,* at 641 (concurring opinion).

[23] "It is worth noting that about two years after the attempted inspection in *District of Columbia v. Little,* 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two year old child. Washington Star, Aug. 6, 1949, p. A-20, Col. 1; Aug. 7, 1949, p. A-7, Col. 7. While the cause of the fire was reported as undetermined, the incident serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection." Brief for the Member Municipalities of the National Institute of Municipal Law Officers as Amici Curiae, p. 8, *Frank v. Maryland, supra.*

> "To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of a crime has no such protection is a fantastic absurdity." 178 F.2d at 17.

This widely quoted statement[24] is mischievous nonsense which only obscures the basic issues involved. If the word "search" has a consistent meaning in that sentence, the home of a man *not* suspected of a crime cannot be searched with or without a warrant. Both homes, however, may be subject to a reasonable health inspection. The purpose of the Fourth Amendment is to protect, not those suspected of crime from a proper search, but everyone from arbitrary or oppressive searches.[25] In the area of criminal law or forfeitures a search has the most serious repercussions for the individual ranging from the initial abrupt invasion of privacy to undoubted damage to reputation, and subsequent possible loss of liberty itself.

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[24]See, *e.g.*, *Frank v. Maryland*, *supra* at 378 (dissenting opinion); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup.Ct.Rev. 46, 74. It should be noted that Dean Barrett's criticism was *not* of the result in *Frank* as to which he took no position.

> "It is not meant to suggest that search warrants should necessarily be required for health inspections. *Cf.* Way, *Application of the Fourth Amendment to Civil Proceedings*, 14 Food Drug Cosm. L.J. 534 (1959). Attention here is directed only to the reasons given by the Court for dispensing with the requirement for a warrant." *Id.* at 72, n. 84.

[25]It is because the method used to assure the protection of the unsuspected is the exclusionary rule that, in application it often "protects" the clearly guilty.

Where both the ultimate consequences to the individual and the actual "invasion" which takes place are radically different, as in health inspections, it is surely not a "fantastic absurdity" to apply a different standard of reasonableness.

In dissenting in *Frank*, Justice Douglas stated:

> "Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken . . . . The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations." 359 U.S. at 383.

If the standard of probable cause in a health inspection is not that required in a criminal case, it logically follows that the standard applied to determine whether a "search" without a warrant is reasonable is also not that of the criminal case.

In other areas, moreover, the Constitution does in fact give not just different but greater consideration to the privacy of the suspected criminal than to the ordinary citizen. We might easily paraphrase Judge Prettyman: To say that a man suspected of crime has the right to prevent disclosure of his private papers, and to remain absolutely silent, but that a man not suspected of crime has no such right of privacy is a

fantastic absurdity. Is this not, however, the command of the Constitution? See *Boyd v. United States,* 116 U.S. 616 (1886); *Miranda v. Arizona,* 384 U.S. 436 (1966).

In *Tehan v. Shott,* 382 U.S. 406, 416 (1966), this Court in speaking of the privilege against compelled self-incrimination said that it reflected the concern of our society for "the right of each individual to be let alone." This "right to be let alone," however, is fully protected only where the prospect of prosecution is involved.

> "All concern for personal dignity disappears when the prospect of prosecution is removed. If privacy were our guide, moreover, we would be hard put to explain why a grocery list, or an automobile repair bill, is protected from disclosure if it incriminates, while disclosure of the most personal entries in a diary may be compelled if they do not incriminate." Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination,* 61 N.W.U.L. Rev. 506, 513 (1966).

A distinction between criminal and noncriminal, difficult to justify on grounds of privacy where intimate personal revelation may be equally involved in each instance, is both logical and reasonable in interpreting the Fourth Amendment in the context of health inspections: not only are the consequences different,—no loss of liberty or reputation is at stake—but the kind of "invasion" is entirely different.

Appellant also raises the spector of the unlimited extension of administrative searches "if left free of

Constitutional restrictions." To say that a health inspection without a warrant but with statutory safeguards is reasonable is not to say that administrative searches are free of Constitutional restrictions. The determination that a limited search pursuant to a lawful arrest is reasonable does not remove Constitutional restrictions. The same is true of administrative inspections. Each type of administrative inspection or search must be decided on its own facts and circumstances. This is the only approach which can both protect the individual and meet the needs of society.

Neither is this to say that any health inspector has at anytime, on mere caprice, the right to enter a private home. The remote possibility of abuse by an inspector should not determine whether or not a health inspection without a warrant is permitted by the Fourth and Fourteenth Amendments. Possible abuse of the right to make, without a warrant, a reasonable search incident to an arrest, for instance, has not led to a requirement that all searches for criminal evidence be conducted pursuant to a warrant. *Compare Agnello v. United States,* 269 U.S. 20 (1925), *with United States v. Rabinowitz,* 339 U.S. 56 (1950). There is even less reason to apply such a rule to health inspections. The system established, under which arbitrary inspections are not authorized, amply protects the individual.

The possibility that such inspections will be used as a subterfuge by the police to search for criminal evidence is also raised by appellant. He cites, however, only one case when this was attempted (see AOB 23-

24).[26] As happened in the case cited, sanctions can be applied and the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), assures that they will be. Most significant in considering this particular problem is the fact that although hundreds of thousands of inspections have taken place so few instances of attempted abuse have arisen.

We submit that appellant has not justified his argument that *Frank* should be reversed nor explained how in fact "privacy" would receive greater protection with a search warrant. He uses the principle that the sanctity and security of the home deserve protection to justify destruction of the programs designed and carried out for this very purpose. Sanctity, security, and privacy in the home are values we all want to protect, but saying this does nothing to solve the problem.

> "[O]ne can find in the thought of John Dewey a highly relevant warning against the needlessly devisive influence of abstract philosophic premises, and an appeal to the process of accommodation and adjustment for the business of living which is exemplified in the adjudicating function of a constitutional judge.
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> " 'We need guidance in dealing with particular perplexities in domestic life and are met by dis-

[26] *State v. Pettiford*, a 1959 Maryland case, discussed by Mr. Justice Douglas dissenting in *Abel v. United States*, 362 U.S. 217 (1960). *Abel* involved a search incident to an administrative arrest, pending determination of deportability, on the authority of the Immigration and Naturalization Service.The decision in *Abel* is not necessarily derived from *Frank*, and correct or not, does not relate to *Frank's* continued validity. *Parrish v. Civil Service Com.*, 242 A.C.A. 665 (1966), cited AOB 23, n. 18, did not involve an asserted *right* to inspect.

sertations on the Family or by assertions of the sacredness of individual Personality.

* * *

"'The waste of mental energy due to conducting discussion of social affairs in terms of conceptual generalities is astonishing.

* * *

"'Not only does the solemn reiteration of categories of individual and organic or social whole not further these definite and detailed inquiries, but it checks them. It detains thought within pompous and sonorous generalities wherein controversy is as inevitable as it is incapable of solution. . . .'" Freund, *Umpiring the Federal System,* 54 Colum.L.Rev. 561, 575-76 (1954) (quoting from Dewey, Reconstruction in Philosophy, 188-89, 198-99 (enlarged ed. 1948)).

4. Persuasive reason for retaining the rule of Frank is found in history, in the near unanimity of opinion of those courts which have considered the problem, and in the continuing legislative approval of such inspections.

"[W]hat free people have found consistent with their enjoyment of liberty for centuries is hardly to be deemed a denial of due process. . . ." *Frank v. Maryland,* 359 U.S. 360, 371 (1959).

Among the factors considered by the *Frank* Court in reaching its conclusion was the long history of warrantless health inspections conducted from prerevolutionary days in Maryland and other colonies. The Court considered that these inspections, occurring both before and after the adoption of the Fourth Amendment and state constitutional analogues were of persuasive significance. There is no reason to repeat

this history nor to cite to similar histories in other states.[27] It is pertinent to note, however, that the history of these local and state statutes indicates the changing concern of the legislative bodies as the problems of their constituencies change. It was not until the late nineteenth and early twentieth centuries that housing conditions became of enough concern to engender significant action in the enactment of adequate codes.

> "The beginning of modern code enforcement in America may be placed at the turn of the century, with the enactment in 1901 of the Tenement House Act for New York City. Thus, housing codes and code enforcement for the benefit of the inhabitants are of very recent origin, when compared, for instance, with the common law antiquities of the law of landlord and tenant. Prior to our century, to be sure, there had been building codes and other laws relating to dwellings but their major concern had been the protection of the city from conflagration and building collapse. Regulations to protect the tenants themselves were scant, and were generally limited to provisions aimed at preventing nuisances and limiting the spread of communicable disease. The need for housing codes to protect the inhabitants themselves is a fairly recent phenomenon of the growth of cities." Gribetz & Grad, *Housing Code Enforce-*

[27] See *People v. Laverne, supra,* for a brief discussion of such statutes in New York. See also, *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 305, 321-22 (1905) (dictum): "The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them, or allow them to be kept, in such condition as to create disease."

ment: Sanctions and Remedies, 66 Colum.L.Rev. 1254, 1259-60 (1966); see generally *id.,* at 1259-67.

The first housing law was enacted in California in 1909, and because the major growth of California's cities has occurred since then, has "prevented widespread slums from developing in this state to the same degree they have in many other states." California Housing Report and Recommendation of State Commission on Housing at 11 (1954). As Mr. Justice Frankfurter pointed out in *Frank,* "There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history." 359 U.S. at 371. Indeed, the changes in society have intensified the problems and increased the necessity.

We submit that equally significant is the fact that the Courts and the elected representatives of this present day free people have also deemed it consistent with freedom and due process that such inspections take place without a prior search warrant. The courts which have reviewed such authorizations have, with the exception of the District of Columbia Circuit in *Little,* recognized the need and determined that it outweighed the small inconvenience to the individual.

Prior to the California and Washington decisions now before this Court, the highest Courts of three states considered similar ordinances and reached the same result. See also, *DePass v. City of Spartanburg,* 107 S.E.2d 350 (S.C. 1959).

In *Givner v. State of Maryland,* 210 Md. 484, 124 A.2d 764 (1956), the Court of Appeals of Maryland

held that an ordinance almost identical with section 503 was not unconstitutional in permitting an inspection without a search warrant. The Court concluded that an inspection by a health inspector is made in the exercise of lawful police power and that the need for combating urban blight and the growth of slum conditions, as well as the need for enforcement of minimum housing standards for safety and sanitation, overrides any invasion of privacy which may be incurred by the inspection.

In *City of St. Louis v. Evans,* 337 S.W.2d 948 (Mo. 1960), the Supreme Court of Missouri followed *Givner* in holding that building and health inspectors had a right to enter pursuant to an ordinance similar to section 503. The St. Louis ordinance, in addition, permitted the official to invoke the aid of the police department to enforce his right of entry if denied. The Court found that prohibitions against unreasonable searches and seizures do not prohibit reasonable searches, and while the Fourth Amendment is primarily designed to protect the individual in the sanctity and privacy of his home, books, papers, and property, it does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare.

The third case is that which was affirmed by the equally divided Court in *Ohio ex rel. Eaton v. Price, supra.* Considering an ordinance with terms nearly identical to those of section 503 of the San Francisco Housing Code, the Ohio Court held unanimously that

defendant's conviction for refusing entry should be affirmed, on the ground that the provision for inspection in the exercise of the police power to protect the public health of the citizens of the City of Dayton was not an unreasonable search. *State v. Price,* 168 Ohio St. 123, 151 N.E.2d 523, *aff'd, Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960).

Subsequent to the decisions in issue here and in *See v. Seattle,* No. 180, the Supreme Judicial Court of the Commonwealth of Massachusetts reached the same result in considering an ordinance which imposed a fine for refusing to permit an inspection as an alternative to a bill in equity to require the person to admit the inspector. The Court considered that the defendant could raise the defense that the inspection was unauthorized, unreasonable or discriminatory. *Commonwealth v. Hadley* (Mass. 1966).

Perhaps most significant, these inspection ordinances represent the consensus of the people, through their elected representatives, that the interests of all are best served, and that freedom and liberty are not threatened, by health and safety inspections without a warrant. Thus, the necessity for health inspections is not left to the discretion of a policeman or a petty official, but represents the consensus of the community. The procedures established provide not for a warrant but for substantially equivalent protection against arbitrary inspections. That such an equivalent system for the protection of Constitutional rights is proper is suggested by this Court in *Miranda v. Arizona, supra.*

While these statutes and decisions do not, of course, control this Court in its Constitutional adjudications, they do represent the considered views of legislatures and courts equally devoted to the maintenance of liberty and the support of the Constitution and should not lightly be dismissed.

C. The Circumstances Involved In The Routine Inspection At Issue Present Stronger Reasons Than Those In Frank For Finding That A Right To Inspect Without A Prior Warrant Is Reasonable.

Appellant argues that even if *Frank* is not overruled, the San Francisco ordinance at issue here is unconstitutional because no probable cause is required (AOB 25). We contend that such an inspection without a warrant is reasonable. If a warrant is not required in *Frank* there is even less reason to require one for the routine inspection in this case.

1. The authority granted by the San Francisco ordinance is solely for the purpose of protecting the welfare of the public, and is carefully circumscribed.

In section 101 of the *San Francisco Housing Code,* the policy of the City and County of San Francisco in adopting the code is stated:

> "Sec. 101. *Declaration of Policy.* It is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions and characteristics render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety, and welfare of their occupants and of the public.

"It is further found and declared that there exist in the City and County of San Francisco residential buildings and dwelling units which were legally constructed according to standards now generally recognized to be obsolete and deficient in terms of current, modern housing standards for construction, use, occupancy, light and ventilation and sanitary facilities. *The continued existence of these obsolete and deficient residential buildings and dwelling units is detrimental to or jeopardizes the health, safety, and welfare of their occupants and of the public.*

"It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

"For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

"1. *That it is in the public interest of the people of San Francisco to protect and promote the existence of sound and wholesome residential buildings, dwelling units and neighborhoods* by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete

and deficient residential buildings and dwelling units.

"2. That the adoption and enforcement of a Housing Code is a necessary municipal governmental function in the interest of the health, safety, and welfare of the people of San Francisco." (R 75-76). (Emphasis added)

The purpose of the code, expressed in section 103, is

"to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. . . ." (R 76).

The Housing and Building Codes establish comprehensive regulations to assure that occupied residential buildings do not menace either safety or health. In order to enforce these substantive provisions, both codes contain enforcement provisions. Section 503 of the Housing Code, at issue in this case, grants the authority to enter without individual probable cause. This authority, however, is carefully circumscribed: only authorized employees of city departments or agencies may enter; they may enter only on presentation of proper credentials; they may enter only when necessary for the performance of the duties imposed upon them by the Municipal Code; they have the right to enter only at reasonable times; and, most important, they have no power to force entry.

Thus, with the exception of the requirement for cause related to a particular residence, the limitations

are similar to the Baltimore ordinance approved in *Frank*. See 359 U.S. at 366-67. In lieu of "cause to suspect that a nuisance exists," the San Francisco ordinance imposes the limitation that an inspection must be necessary for the performance of duties imposed by the Municipal Code. Under the Municipal Code the duty of inspecting, at least once a year, all apartment houses for conformance with the housing code is imposed on the Division of Housing Inspection of the Department of Public Health. San Francisco Municipal Code, part III, § 86 (R 36-37).[28]

Other inspections are the responsibility of different officials depending on whether the inspections are within rehabilitation or conservation areas. See Housing Code § 501 (R 80). A conservation area is an area which is to be protected from blighting influences and maintained in a safe and sound state. Housing Code § 203.3 (R 77). A rehabilitation area is one in which deteriorated structures are to be improved or restored to good condition by repair, renovation, conversion, remodeling, reconstruction or the addition of needed improvements. Housing Code § 203.18 (R 78).

Both areas must consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. See Housing Code §§ 203.3, 203.18 (R 77, 78). The planned area inspection required is the inspection of all residential buildings within the designated area for the purpose of determining and eliminating all violations of the

[28]Section 120, not at issue, imposes a similar duty with regard to hotels.

code, and includes a study to determine whether conditions in the area involve aspects of urban renewal. § 203.16. Urban renewal includes activities and undertakings for the elimination and the prevention of the development or spread of blighted areas. § 203.21. The Director of Public Works, through the Superintendent, has the duty to enforce the provisions of the code in these areas.

These are the only inspections authorized to take place as a matter of routine without a reason related to the individual residence, apartment or building. Under Building Code section 802 (App. 4), authority is granted to authorized employees to enter any building thought to be unsafe, illegal, or a menace to life or limb. The Department of Public Works also conducts inspections of all new construction and of alterations done under a building permit. Thus, the San Francisco Municipal Code provides specifically for some routine or area wide inspections, or for entry on cause, but does not grant a power to inspect arbitrarily.

In carrying out these inspections both the Health and Public Works Departments will return several times, if necessary, to reach an accommodation of convenience with the occupant (unless, of course, some emergency exists). It is only when there is a continued refusal without cause, or an indication, as in the instant case, that no consent will be given, that further procedures are taken. Even then, the individual is first cited to the district attorney to show cause why a complaint should not be issued. He, thus,

has an additional opportunity to consent. It is submitted that this procedure insures that no arbitrary inspection will be insisted on by a "petty official" and that the occupant is, in fact, taking no risk in his initial refusal. It taxes credulity to believe that the inspector would continue to insist and that the district attorney would file a complaint if the proposed inspection were arbitrary. Thus, the occupant has not only the substantial practical protection discussed earlier, but an additional opportunity to insure that arbitrary action is not being taken. In this case, appellant was fully aware that the inspection was not arbitrary but was attempted pursuant to this law, and concedes that he has no defense if such an inspection is constitutional (R 61). See AOB 7 n. 4.

The basic purpose of the ordinance is to achieve compliance and obtain for the cities the benefits of safe housing, not to impose criminal sanctions. Public health and safety programs are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violations, that the public welfare is best protected. Effective administration of these programs depends on prompt response to complaints, continued periodic inspections by trained inspectors and the correction of the condition.

The Housing and Building Codes contain provisions providing for notice of substandard conditions, hearings, appeals, and procedures for abatement. See Housing Code §§ 502, 505, 1701-08 (R 80-83, 93-95); Building Code §§ 802-04-I (App. 4-9); Health Code

§§ 596-99 (App. 12-16). Criminal prosecution is resorted to only after all other measures have failed (see R 70). The fact that such a sanction may be used is important to achieve compliance; however, it is abatement which is desired.

Finally, as pointed out earlier, the occupant may not even be the one against whom such action is taken.

Under these ordinances, the San Francisco Department of Public Works conducted 145,589 inspections in 1964. This included inspections of new construction, inspections of existing buildings, and investigations in connection with permit applications. Between July 1, 1964 and June 30, 1965, the Department of Public Health inspected 16,053 apartment buildings on 50,014 inspection trips. Since these apartment buildings contain varying numbers of rooms, the number of dwelling units inspected would be many times this number. In the Urban Renewal Program, ten areas have been designated for code enforcement programs. In these areas, since 1959, 4,734 buildings containing an estimated 14,500 dwelling units have been inspected and 3,543 violations detected. In the yearly period covered by the last annual report only 150 complaints were received.[29]

The number and variety of these inspections are such that the necessity for prior warrants could effectively destroy the entire program. It is respectfully submitted that the dissenting opinions in both

[29]Inspection figures compiled in the report submitted annually to the Department of Housing and Urban Development are contained in the Appendix at 23, 26, 27.

Frank and *Eaton* and the majority opinion of the Court of Appeals in the *Little* case have not squarely met the issue involved: How are these thousands of daily inspections, solely for the purpose of protecting the health of the public, to be conducted if the right to inspect is conditioned on a prior search warrant?

As justification for the imposition of a search warrant as a prerequisite for asserting the right to conduct a routine inspection, Mr. Justice Douglas cites the thousands of inspections made annually in Baltimore and the fact that the number of prosecutions for refusing to permit entry have averaged one per year. He then states:

> "Submission by the overwhelming majority of the populace indicates there is no peril to the health program. One rebel a year (*cf.* Whyte, The Organization Man) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor." 359 U.S. at 384.

While there may be only "one rebel a year" where officials have a right to inspect without a warrant, it cannot be said that such would be the case when there is no right to enter without a warrant. San Francisco has for three years conducted a Home Fire Safety Program where fire safety inspections are made of dwellings on a consent basis—no right to inspect is asserted.[30] In this period, 46,848 homes were con-

[30]See Fire Code § 1.04 (App. 11-12). This section was amended in 1965 to require the consent of the occupant of any dwelling (one or two families) for entry. Prior to this, although authority for entry was not so restricted, this program was administered solely on a consent basis.

tacted where someone was at home. In 7,244 cases the occupant refused to permit the inspection (See App. 38). If this proportion, in excess of 15%, were applied, for instance, to the conservation program inspections enumerated above, in excess of 2000 search warrants would be required. Applied to the inspections made by the Department of Public Works, more than 21,000 warrants would be required.[31] The inspectors and the courts could not handle this volume.

Moreover, as established by this Court in *Rabinowitz,* it is not the practicality of obtaining a warrant which is controlling, but whether or not the search is reasonable.

2. Where a routine inspection is involved, no purpose whatever would be served by a prior warrant requirement.

The dissenting opinions in both *Frank* and *Eaton* indicate that the purpose of obtaining a warrant is to insure that an objective mind will weigh the need to invade privacy to enforce the law. In a case based on a complaint, or on probable cause to believe a violation is taking place, there are at least facts and witnesses which the Court could consider in making a determination.

In the case of the San Francisco ordinance, there has been a legislative determination that there is a need for annual inspections and planned area inspections where administrative agencies make an appro-

[31] We make no claim that such results would necessarily follow; the figures, however, strongly indicate that Mr. Justice Douglas' prediction of "one rebel a year" may be too optimistic.

priate determination. There are, however, no additional "facts" relating to any individual situation which the judge could weigh. It was pointed out by the dissenting judge in *Little:*

> "Moreover, even if an Act providing for such search warrants should be placed upon the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine examination? Regular periodic inspections are conducted for the purpose of making certain that laws relating to sanitation and safety are being observed . . . . If a search warrant were necessary for such recurring inspections, the requirement would amount to turning over the supervision of administration from the executive to the judicial branch of the Government, which, as the Supreme Court has observed in the past, would be a source of mischief and is contrary to the philosophy of our form of Government." 178 F.2d at 24.

What purpose is served, for example, in interposing a magistrate in the circumstance of a planned area inspection? The responsible agencies make an administrative determination, using their expertise in the field of planning and urban design, that an area can be preserved or rehabilitated. Essential to the program is the inspection of every building in the area. When an occupant asserts a "right" to refuse entry, if the official must then get a warrant, what does the magistrate do? If he must accept the administrative decision, he serves no function because there is no weighing of the need to invade privacy. Is this judi-

cial seal of approval then good for the whole area, or must the official return for a new determination on each refusal? If the judge is not merely a "rubber stamp," is he expert enough to make the final decision as to whether an area is to be rehabilitated? This would seem to be a determination more appropriately made by the agency with expertise in the field. If he does make this decision, what happens when the second occupant refuses to consent to entry, a different judge hears the case, and a different determination is made? A rehabilitation program can only succeed when the whole area is treated uniformly.

Moreover, there is widespread citizen participation and involvement in the selection of areas to be conserved or rehabilitated. An indication of this planning on all levels of local government can be seen in the Annual Report on the San Francisco Workable Program. Some relevant excerpts from this report have been reproduced (See App. 28-38).

Much the same considerations apply to the routine inspection of apartment houses attempted in this case. There has been a determination that such periodic inspections are necessary on the legislative level closest and most responsive to the problems of the city and the welfare of the residents. The necessity for, and the procedures to be used in, these inspections are under constant local legislative and citizen review. The right of entry has been curtailed where experience has shown it is unnecessary or where possible inconvenience to the occupant is thought to outweigh the benefits. See n. 30, *supra*.

Therefore, it is apparent that a routine inspection pursuant to this carefully circumscribed ordinance presents even a stronger case than *Frank* for a determination of reasonableness.[32] As previously pointed out, however, there is no real reason for imposing a search warrant requirement even in the *Frank* situation; the protections are the same and fully adequate to insure against arbitrary and oppressive inspections. These health and safety inspections are so complex and inter-related that a warrant requirement for any single type would result in enormous difficulty.

Some indication of this complexity can be seen in the circumstances of the instant case. The health inspection was attempted because the Municipal Code required such inspections to be made routinely. Once the inspector had learned that appellant was allegedly living in commercial premises, there was, in fact, a reason to inspect based on individual cause. There was a greatly increased likelihood that a safety hazard

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[32] See Mr. Justice Black's comment in *District of Columbia v. Little*, 339 U.S. 1, 3 (1950):

> "At one extreme the district argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspections can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants."

endangering the other tenants had been created through unauthorized or unapproved heating, cooking, or plumbing installations. Moreover, appellant was illegally "living" in *commercial* premises. If different "warrant" requirements are imposed for inspections on cause, for routine inspections, or for inspections of commercial premises, into which category does this attempted inspection fall? The entire program of commercial inspections could be curtailed through the simple expedient of alleging that, in fact, an unauthorized residence had been created.

We contend that a constitutionally imposed search warrant requirement for health inspections would create far more problems than would be solved. The result would be both confusion and an enormous burden on the courts, with no more protection of the right to privacy than now exists.

CONCLUSION

The attempt by the City and County of San Francisco to preserve and improve the quality of its housing represents a valid exercise of the city's police power. To impose a requirement of a prior search warrant could make it nearly impossible to carry out the regular inspections vitally necessary for the success of the program. The nature of the obligation of the individual as a member of the public, and the purpose of the ordinance, solely to protect the public health, distinguish this kind of inspection from a search for criminal evidence: the liberty of the indi-

vidual is not at stake, but the health and safety of the public is. It is surely not too much to ask that each individual give up a small portion of his absolute privacy in order that all individuals may be secure.

The Constitution today must be a growing and flexible document, reflecting the problems and protections needed in an increasingly complex and interdependent society, and not a document of rigid absolutes unrelated to cor iderations of the needs of society and the nature of the individual interests concerned.

For these reasons, it is respectfully submitted that the judgment of the District Court of Appeal be affirmed.

Dated, San Francisco, California,
January 16, 1967.

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(Appendix Follows)